Supreme Court, U. S.
FILED
SEP 12 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-848

THOMAS U. GREER AND JAMES R. SCHLESINGER,
Petitioners

v.

BENJAMIN SPOCK, JULIUS HOBSON, SOCIALIST WORKERS PARTY, JOHN GINAVEN, DONALD MISCH, ALAN HARDY, AND ROBERT STANTON,
Respondents

BRIEF FOR RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DAVID KAIRYS
KAIRYS AND RUDOVSKY
1427 Walnut Street
Philadelphia, Pa. 19102
Counsel for Respondents

THE LEGAL INTELLIGENCER, 99 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4850

TABLE OF CONTENTS

Page

Counter-Statement of the Issues Presented 1

Counter-Statement of the Case 2

Summary of Argument 13

Argument:

I. The candidate respondents have a right to speak and distribute literature concerning their campaigns on the public streets, sidewalks and parks in the open areas of Fort Dix. 18

A. The areas of Fort Dix in which respondents were allowed to exercise First Amendment rights are open to the public. 20

B. Civilians have a right to speak and distribute literature on the public streets, sidewalks and parks in the open areas of Fort Dix. 23

C. The candidate respondents have a right to speak and distribute literature concerning their campaigns on the public streets, sidewalks and parks in the open areas of Fort Dix. 31

II. Civilians who have a First Amendment right to distribute literature on the public streets, sidewalks and parks in the open areas of Fort Dix cannot be required to submit their literature to military authorities for prior approval based on content. 36

A. No prior restraint based on content may be imposed on distribution of literature on the public streets, sidewalks and parks in the open areas of Fort Dix. ... 37

Page

B. The system of prior restraint at Fort Dix lacks precise and narrow standards and procedural safeguards. 40

Conclusion 43

TABLE OF CITATIONS

Cases:

Adderly v. Florida, 385 U.S. 39 ..... 25, 26

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 43

Blount v. Rizzi, 400 U.S. 410 41

Burnett v. Tolson, 474 F.2d 877 (4th Cir. 1973) 19

CCCO-Western Region v. Fellows, 359 F. Supp. 644 (N.D. Calif. 1972) 19

Cantwell v. Connecticut, 310 U.S. 296 ..... 18, 38

Carrington v. Rash, 380 U.S. 89 ..... 31, 35, 39

Cox v. Louisiana, 379 U.S. 559 26

Edwards v. South Carolina, 372 U.S. 229 ..... 25, 28

Flower v. United States, 407 U.S. 197 ..... 8, 9, 13, 14, 18, 19, 20, 21, 22, 23, 26

Freedman v. Maryland, 380 U.S. 51 ..... 38, 43

Garrison v. Louisiana, 379 U.S. 64 30

Grayned v. City of Rockford, 408 U.S. 104 ..... 27, 29

Grosjean v. American Press, 297 U.S. 233 38

Hague v. CIO, 307 U.S. 515 ..... 24, 25, 38

Healy v. James, 408 U.S. 169 ..... 25, 29, 30, 34

Jacobellis v. Ohio, 378 U.S. 184 41

Jamison v. Texas, 318 U.S. 413 18

Cases: Page

Jenness v. Forbes, 351 F. Supp. 88 (D.R.I. 1972) .. 19, 33

Kunz v. New York, 340 U.S. 290 38

Lehman v. City of Shaker Heights, 418 U.S. 298 32

Lloyd v. Tanner, 407 U.S. 551 ..... 18, 22, 34

Lovell v. Griffin, 303 U.S. 444 ..... 18, 25, 38, 40

McGraw v. Farrow, 472 F.2d 952 (4th Cir. 1973) 19

Mills v. Alabama, 384 U.S. 214 34

Murdock v. Pennsylvania, 319 U.S. 105 18

Near v. Minnesota, 283 U.S. 697 38

Niemotko v. Maryland, 340 U.S. 268 ..... 25, 30

Organization for a Better Austin v. Keefe, 402 U.S. 415 18

Parker v. Levy, 417 U.S. 733 ..... 28, 35, 39

Pell v. Procunier, 417 U.S. 817 ..... 25, 30

Police Department of Chicago v. Mosley, 408 U.S. 92 ..... 18, 28, 29, 34, 38

Procunier v. Martinez, 416 U.S. 396 ..... 25, 28, 30, 31

Roth v. United States, 354 U.S. 476 41

Schneider v. State, 308 U.S. 147 ..... 18, 27, 34

Southeastern Promotions v. Conrad, 95 S.Ct. 1239 .. 24, 25, 34, 37, 38, 40, 43

Stromberg v. California, 283 U.S. 359 30

Sweezy v. New Hampshire, 354 U.S. 234 34

Terminiello v. Chicago, 337 U.S. 1 29

Thomas v. Collins, 323 U.S. 516 38

Thornhill v. Alabama, 310 U.S. 88 30

TABLE OF CITATIONS (*Continued*)

Cases: Page

Times Film Corporation v. Chicago, 365 U.S. 43 38

Tinker v. Des Moines Community School District, 393 U.S. 503 ..... 18, 25, 26, 29

United States v. Floyd, 447 F.2d 217 (10th Cir. 1973) 18, 19

United States v. O'Brien, 391 U.S. 367 .... 24, 25, 28, 34

United States v. Thirty-seven Photographs, 42 U.S. 363 41

Williams v. Rhodes, 393 U.S. 23 ..... 34, 35

Constitution:

First Amendment ..... *Passim*

Statutes:

18 U.S.C. §1382 ..... 2, 28, 35

18 U.S.C. §2387 ..... 28, 35

28 U.S.C. §1331 ..... 10, 12

Other Authorities:

Fort Dix Regulations:

210-26 ..... 2, 12

210-27 ..... 2, 12, 37

Army Directive on Guidance and Dissent 37, 41

Army Regulation 210-10 37

Department of Defense Directive 1325.6 ..... 37, 41

COUNTER-STATEMENT OF THE ISSUES PRESENTED

1. Whether the candidate respondents have a right to speak and distribute literature concerning their campaigns on the public streets, sidewalks and parks in the open areas of Fort Dix.

2. Whether civilians who have a right to distribute literature on the public streets, sidewalks and parks in the open areas of Fort Dix can be required to submit their literature to military authorities for prior approval based on content.

COUNTER-STATEMENT OF THE CASE

1. On September 9, 1972, Benjamin Spock and Julius Hobson, candidates of the People's Party for President and Vice-President of the United States, and Linda Jenness and Andrew Pulley, candidates of the Socialist Workers Party for President and Vice-President of the United States, wrote to General Bert A. David, Commander of the Fort Dix Military Reservation, advising him that they intended "to visit Fort Dix to campaign among the servicemen and servicewomen there on September 23, 1972" (I-App. 12-13). They stated that they wanted "to distribute their literature and talk to the soldiers about the issues that concern them," and that "[i]t is not our intention to disrupt the normal functions of the base and we will of course abide by reasonable restrictions as to the time and places of our campaigning" (*id.*).[1]

General David, who was subsequently replaced by Petitioner Thomas U. Greer, replied on September 18, 1972, denying the candidate respondents permission to visit Fort Dix for the purpose of making "political speeches" or distributing literature "without prior approval" (*id.* at 14-15). He advised them that their entering Fort Dix for these purposes would violate Fort Dix Regulations 210-26 and 210-27 and 18 U.S.C. §1382, interfere with the military mission, and "give the appearance that you or your campaign is supported by me in my official capacity" (*id.*).

On September 21, 1972, candidates Spock and Pulley, through their counsel, informed General David that they intended to enter Fort Dix at the Wrightstown Road entrance on September 23, 1972 to discuss with him his decision denying their request and to campaign (*id.* at 7, 36). The Wrightstown Road entrance to Fort Dix is only

1. They also referred to a recent decision in the New Jersey state courts that allows military personnel stationed in New Jersey to register and vote there (I-App. 12). Petitioners encourage military personnel to vote (*id.* at 59), and the Socialist Workers Party and Peoples Party candidates were on the ballot in New Jersey (*id.* at 99).

several feet from the commercial district of Wrightstown, New Jersey (*id.* at 162; depicted in the photographic exhibit[2] at II-App. E-2), and, like the other entrances to Fort Dix, has no guards, gates, barriers, or other impediments to free access by the public (I-App. 66-68, 24, 52-53, 162-63, 200). However, on that day, a representative of the Commander was at the Wrightstown Road entrance and refused to admit respondents to the base (*id.* at 7-8, 36).

On September 29, 1972, the four minor party candidates, four other civilians, and the Socialist Workers Party brought this action concerning their rights to speak and distribute literature without prior approval in the areas of Fort Dix that are open to the public. The four additional civilians, Respondents John Ginaven, Donald Misch, Alan Hardy and Robert Stanton, had been ejected from Fort Dix and issued letters barring their reentry for peacefully distributing unapproved literature on the base (*id.* at 7-8, 36-37). Respondents did not question, and do not now question, the power of the petitioners to close all or a portion of the base or to regulate the time, place and manner of exercise of First Amendment rights on open portions of the base. Respondents' claim was and is based on the longstanding principle that in government controlled areas to which the public has free and open access, particularly open areas like streets, sidewalks and parks, the government may not prohibit all exercise of First Amendment rights or selectively prohibit exercise of such rights based on content (*id.* at 4-11).

2. Fort Dix is a military facility primarily devoted to the training of soldiers (*id.* at 27). Access to Fort Dix is

2. This photograph, taken from within the base, depicts Respondents Ginaven and Misch distributing literature on a sidewalk on the base just before their arrest and ejection (I-App. 160-61). The base begins just outside the commercial district of Wrightstown, New Jersey, approximately at the railroad crossing sign depicted in the photograph behind Respondents Ginaven and Misch (*id.* at 162). There are no gates; brick mounds on both sides of the street, not visible in the photograph, mark the boundary (*id.* at 163).

freely open to the public except in a few, relatively small restricted areas. The evidence presented by the respondents in the district court, which was unrebutted,[3] shows that the open portions of Fort Dix are essentially indistinguishable from the surrounding areas in New Jersey except that they are controlled by military rather than civilian authorities. Except where noted, the references to the record made in the following discussion are references to the testimony of two colonels, Jasper R. Johnson, Director of Personnel and Community Activities, and Vincent I. Olsen, Provost Marshal, who appeared pursuant to respondents' subpoena of General David or his representative (*id.* at 41, 66).

Ten entrances to Fort Dix, and several additional foot paths, have no guards, sentries, barriers, gates or other impediments to free and open access by civilians (*id.* at 66-68, 24, 52-53, 62-63, 200). "[C]ivilians are authorized on the post" (*id.* at 66). With the exception of the restricted areas, where First Amendment rights were not claimed, civilians can pass through, visit, tour the base, walk around, ride around, talk to military personnel, eat at the cafeteria, enter for any reason or no reason at all—without being questioned, stopped, or hindered in any way (*id.* at 66-71, 61, 73, 82-83, 185).[4] The base is crisscrossed by New Jersey state and county roads that are civilian thoroughfares (*id.* at 68). Public buses freely enter and leave the base, picking up and discharging civilians without being monitored or controlled (*id.* at 68-69).

Civilians are regularly allowed to address various sized gatherings of military personnel and their dependents on a wide variety of topics. Businessmen come to speak to

3. Petitioners did not present any testimony but relied on the testimony of two colonels subpoenaed by respondents as representatives of General David and on two affidavits that are in accord with that testimony.

4. Donald Campbell, a private in training at the base, testified that during his orientation period, he and the other soldiers were told by their sergeants that the base is open and that it is sometimes dangerous at night because so many civilians freely enter (*id.* at 102-103).

soldiers about business management principles (*id.* at 51-52, 55). Up to 500 listen to religious talks at the chapel (*id.* at 54-55). People from the surrounding community come in to discuss "emergency preparedness" (*id.* at 55-56). Civilians address gatherings of 50 soldiers about drug abuse (*id.* at 56). Civilians visit fairly regularly to convey various types of information (*id.* at 56-57). Some door-to-door distribution of literature is allowed (*id.* at 80). Civilians have informal discussions, individually or in groups, with military personnel on a wide variety of topics (*id.* at 55-57, 71); a civilian speaking to a few soldiers on the sidewalk in front of the main PX is so common that Colonel Olsen did not think it would be noticed (*id.* at 71). There are even outdoor rock music concerts open to civilians attended by as many as 5,000 people (*id.* at 53-54).

Civilian witnesses testified concerning their experiences on the base. Dina Portnoy, who worked in Wrightstown, New Jersey, regularly went to various facilities on the base, including barracks and a cafeteria, without being stopped or questioned (*id.* at 86-87).[5] She also regularly used the state and county roads running through the base, including New Jersey Route 68 and Texas Avenue, as thoroughfares to get from Wrightstown to a friend's home in Browns Mills, New Jersey (*id.* at 86). Sidney Stapleton rode and walked around the base for a few hours on October 5, 1972 (*id.* at 92). A soldier on duty at an information booth told him the base is open to access by the public (*id.* at 95). He ate at a cafeteria, visited the PX, bought newspapers, and went to barracks (*id.* at 92-95). He stopped at one entrance to the base and counted fifty-three non-military vehicles (without military decals) going in and out in fifteen minutes; most of the traffic was non-military (*id.* at 94-95).[6]

5. Her civilian co-workers attended movies at the base theater (I-App. 87).

6. There was a stenographic mistake at page 102 of the notes of testimony of the initial hearing that was formally corrected by the stenographer but still appears at I-App. 95. Mr. Stapleton testified that most of the traffic was "non-military," not "military,"

Military personnel in training, who are prohibited from leaving the base for the first half (four weeks) of their training period, have off-duty time in the evenings and on weekends, which increases as their training period progresses (*id.* at 27, 28, 50, 101 (Private Donald Campbell)). They can use this time to read books, newspapers, and other periodicals, which are readily available in a library and at stores, watch television (there is one in each barracks), listen to radio, play sports, or just relax (*id.* at 43, 60). Discussion of the important issues of the day among the soldiers is "quite common" (*id.* at 43-44). Private Donald Campbell, in training at the base, testified that there is considerable leisure time, during which he had read four books in the last three weeks, and that the soldiers have time to hear addresses by candidates (*id.* at 101-103).

Written materials and media available on the base contain partisan and somewhat varied viewpoints (*id.* at 60, 61). The October 5, 1972 issue of *Army Times*, a newspaper generally available on the base, had a full page ad urging the re-election of President Nixon which Colonel Johnson found "very partisan" (*id.* at 44-46; ad reproduced at II-App. E-3). The views and positions of the other major party's candidates are also available on the base (I-App. at 63). However, not all viewpoints, periodicals, literature, speeches, or candidates are allowed to be seen or heard; they are screened on the basis of content. Colonel Johnson was asked:

> "Q . . . isn't it true that the content of what a proposed visitor intends to say is the basis for whether

as appears on that page. Counsel for respondents referred to this testimony the correct way in his summation before the district court (*id.* at 114) and noted the mistake in his briefs before the court of appeals. When counsel for petitioners indicated in his brief before the court of appeals that he was not sure which way was correct, respondents asked the stenographer to review her tapes. After reviewing the tapes, the stenographer determined that Mr. Stapleton said "non-military," and she filed a correction with the court of appeals, a copy of which was sent to petitioners' counsel.

he is allowed to come on or not? If, for instance, he says, 'I intend to urge the soldiers not to use drugs,' that, from what you have said, would be something that the Base might favorably look on. If he is going to inform them of some management principle that they are not aware of—

"A That would further our mission, yes.

"Q But if they are to speak against the war in Vietnam—

"A That certainly wouldn't forward our mission, would it?

"Q So the content of what they are to say, that is the basis of whether or not they are approved?

"A Yes, to a great extent." *Id.* at 64.

Newspapers and leaflets are also approved or disapproved for distribution on the base according to their content (*id.* at 70, 76-77). Colonel Olsen testified that a newspaper not on the "approved" list has to be submitted for approval before it can be sold at base stores (*id.* at 76-77). "If it's a paper that is wrong," it will not be approved (*id.* at 77). The views and positions of minor party candidates are not available on the base (*id.* at 103, 63, 93).[7] Petitioners' repeated statement that permission to distribute literature on the base "would be denied only in regard to publications that clearly threaten military discipline or morale" (Pet. Brief 2, 43, 47) has meaning only if one wishes this Court to resolve the important issues in this case without consideration of the record.[8]

7. Private Donald Campbell, who looked through the media materials available at his company's PX and the reception station PX, did not find "anything about any of the presidential candidates except for the major ones, the Democrats and Republicans" (I-App. at 103). Neither Colonel Olsen nor a civilian, who looked through the literature available at the main PX, saw any literature concerning minor party candidates (*id.* at 63, 93-94).

8. For additional testimony indicating that all forms of speech are censored based on content, see I-App. 62, 69-70, 76-

Petitioners' regulations and practices left respondents without any means of reaching the soldiers at Fort Dix, whom they regard as a uniquely important audience for their views and campaigns. Fred Halstead, a member of the National Committee of the Socialist Workers Party, testified:

> "We think we have a position on issues of particular importance to GI's, particularly on the war. I don't know anybody who has a better right to have an opinion on the war, to express that opinion, and to make an intelligent decision on it based on hearing all points of view . . .
>
> ". . . We don't get much radio and TV time. We don't have the money for it. We very rarely are reported in the major press. . . .
>
> "Our main way of reaching people in our campaigns is distributing leaflets, speaking to them personally, organizing meetings to which we invite them, going to the places where they are and speaking to them . . . ." I-App. 97-98.

3. The District Court found that "[t]he roads leading into Fort Dix are not covered by guards or barriers" (Pet. App. 3a) and there is "a great volume of both civilian and military vehicular traffic" (*id.* at 4a). Without negating the openness of the base pursuant to this Court's decision in *Flower* v. *United States*, 407 U.S. 197, the district court denied relief based on its interpretation of the term "abandoned" in the *Flower* decision. In *Flower*, the Court said that since New Baunfels Avenue on Fort Sam Houston was open to the public, "the military has abandoned any claim that it has special interests in who walks, talks, or leaflets on the avenue." 407 U.S. at 198. The district court inter-

77, 154-55 (concerning the *Fort Dix Post*), 156-57 (concerning the *Army Times*), 192-93, 195-96 (concerning materials at post exchanges).

preted this statement to mean that First Amendment rights may be exercised by civilians only on portions of a military base that are not only open to the public but also have been abandoned in the sense that the military has left them unattended and uncontrolled. The court said:

> "In this case, the Command has not 'abandoned' control over any part of Fort Dix. Although civilian vehicles are allowed across some four of its roads, [9] the Military Police has jurisdiction and authority over all criminal offenses and traffic violations throughout the base and as the testimony of the Provost Marshal discloses, exercises it.
>
> "Therefore, in my view, *Flower*, *supra*, was never intended to apply to the situation of which we are here involved." Pet. App. 7a-8a.

While the military patrols the open areas of Fort Dix, the district court said that in *Flower* "[t]here is nothing in the two opinions [of the Fifth Circuit and this Court] which would indicate any control of New Braunfels Avenue by the military" (*id.* at 5a). However, the street where Flower was arrested was part of the base and was so marked, and his arrests there by military police on two occasions (for distribution of unapproved leaflets) indicate that the military was patrolling and exercising control over that area. Moreover, the district court misinterpreted the *Flower* decision; in *Flower* the Court held that the military had "abandoned" the right to prohibit exercise of First Amendment rights, not control over the base.[10]

4. The court of appeals reversed and directed that the candidate plaintiffs be granted preliminary injunctive

9. The uncontradicted testimony of Colonel Olsen, the Provost Marshal, indicates that there are ten open entrances as well as a number of open footpaths (I-App. 68).

10. This question was discussed by the court of appeals at Pet. App. 24a.

relief.[11] Holding that the findings of the district court were "clearly erroneous" (Pet. App. 22a), the court concluded that:

> "The record establishes that Fort Dix, a reservation of over fifty-five square miles, is crossed by ten paved roads, including a major state highway, Route 68, on all of which unrestricted vehicular traffic, civilian as well as military, is permitted at all times . . . . Busses, operated as common carriers, use the roads on the base. They pick up and discharge passengers, civilian and military. Civilians are authorized on the post. There are numerous employed civilians. Business concessions are conducted on the post. Civilians are welcome to visit soldiers. Tourists are welcome. Entertainments are occasionally provided at which as many as 5,000 people may congregate at a sports arena on the post . . . . One can visit the post for any reason at all, or no reason at all, except apparently, to campaign for political office or to distribute unapproved leaflets. The gate at which candidates Spock and Pulley were stopped is on the Wrightstown Road, about five feet from the commercial district of Wrightstown. It is normally open and unguarded, but was apparently guarded by representatives of defendant David on September 23, 1972, in anticipation of the visit. A traffic count taken in 1970, the most recent available, disclosed a daily vehicle count of 66,000 vehicles . . . . Fort Dix, when compared to Fort Sam Houston, is *a fortiori* an open post." *Id.* at 22a-24a.

11. The pamphleteer plaintiffs were denied preliminary relief because their claim was not as immediate and it was not as clear that they could satisfy the jurisdictional amount requirement of 28 U.S.C. §1331 (Pet. App. 29a-30a). At the final hearing and appeal, the question of jurisdictional amount, which became the primary issue, was resolved in favor of the pamphleteers as well as the candidates. See Point 7 of this section, *infra*.

With regard to campaign speeches and the requirement of prior approval of literature, the court said:

> "The record makes clear that almost the world-at-large, with the exception of political candidates, is free to come on the base and talk to persons living and working there. The record makes clear that large assemblies occasionally take place. Thus we cannot find that distribution of leaflets, face to face campaigning, or even the holding of meetings would *per se* be disruptive of the mission of the facility. The military authorities have themselves decided otherwise.
>
> "* * *
>
> ". . . [B]ar orders have . . . been issued for distributing 'unauthorized publications.' Unauthorized publications are those which have not been submitted to and approved by the Adjutant General, and his approval or disapproval depends upon the content of the message. A more vivid instance of a prior restraint on activities protected by the first amendment can hardly be imagined." *Id.* at 24a-26a.

5. Petitioners' application to this Court for a stay was denied (*id.* at 33a), and pursuant to the mandate of the court of appeals, a preliminary injunction was issued by the district court (*id.* at 34a). Negotiations between the parties resulted in an order of the district court specifying the times and places for distribution of literature and a campaign address by the candidate plaintiffs (*id.* at 36a-38a).

6. Leaflets announcing the campaign visit were distributed on the open areas of the base, at the times and places specified by the order, without even a minor incident (I-App. 172). The person in charge of the leafletting described the reception given the leafleteers as "friendly" (*id.* at 172). The rally, held on a Saturday afternoon at a parking lot on the base, was attended by 150 to 200 persons, including 60-75 civilians (*id.* at 172-74, 180, 182). Colonel

Olsen, testifying at the final hearing, was asked if there was "any trouble" at the rally, and he responded, "None that I recall" (*id.* at 184). The court then asked him if there were any "disturbances," and he testified, "None whatsoever" (*id.*).

7. After a final hearing, the district court issued a permanent injunction in favor of candidates Spock and Hobson[12] and the four pamphleteers, all of whom are respondents here, concerning the public streets, sidewalks and parks in the open areas of Fort Dix (Pet. 44a-46a).[13] Petitioners were enjoined from: (1) interfering with political campaigning and distribution of literature, subject, of course, to regulation of the time, place and manner; (2) requiring prior approval of the contents of any communication; (3) enforcing Fort Dix Regulations 210-26 and 210-27 insofar as they prohibit political speeches or distribution of literature without prior approval of the content; and (4) issuing bar notices based on the constitutionally protected activity described in the order (*id.* at 44a-45a). Petitioners' claim that First Amendment rights are incapable of valuation and therefore nonjusticiable pursuant to 28 U.S.C. §1331, the main issue raised by petitioners at the final hearing, was rejected (*id.* at 442).[14] The court of appeals affirmed the final order of the district court in its entirety (*id.* at 47a-56a).

---

12. The complaint was dismissed as to candidates Jenness and Pulley because they were below the minimum age for the offices they sought (Pet. App. 40a-41a, 46a).

13. All of the areas involved in this litigation and covered by the injunction are public streets, sidewalks and parks. See note 20, *infra*.

14. Petitioners strenuously argued in the courts below that violation of First Amendment rights could never satisfy the jurisdictional amount requirement in 28 U.S.C. §1331, a position that could have the effect of barring any suits to redress deprivation of First Amendment rights by federal officials. Petitioners have not raised the issue in this Court.

SUMMARY OF ARGUMENT

I.

The court of appeals ruled that the candidate respondents have a right to speak and distribute literature concerning their campaigns on the public streets, sidewalks and parks in the open areas of Fort Dix. The court's decision was based on the following facts: (1) "almost the world-at-large" has regular, free and open access to Fort Dix; (2) civilians enter the base to talk to military personnel, individually or in small groups, on any subject; (3) civilians address gatherings of military personnel on a variety of issues; (4) these gatherings include "large assemblies" held outdoors and open to civilians; (5) the partisan political viewpoints and campaigns of the major party candidates are heard throughout the base; (6) exercise of First Amendment rights is approved or disapproved based on content; and (7) civilians "can visit [Fort Dix] for any reason at all, or no reason at all, except apparently, to campaign for political office or to distribute unapproved leaflets" (Pet. App. 21a-29a).

Petitioners challenge the ruling of the court of appeals on a number of grounds, including a claim that, contrary to *Flower* v. *United States*, 407 U.S. 197, no civilian may exercise First Amendment rights on any portion of any military base, regardless of the openness of the base, the nature and uses of a particular area, the imposition of selective restrictions on speech based on content, or anything else.

Petitioners analysis and arguments are based on an asserted dichotomy between "public streets, sidewalks and parks," where First Amendment rights may be exercised, and "military bases," where petitioners claim that no First Amendment rights may be exercised. However, the areas in which respondents were granted the right to speak and distribute literature are public streets, sidewalks and parks. The issue is whether these public streets, sidewalks and parks, although open and freely used by civilians for speech

or any other purpose, should be exempt from all political speech, or from political speech of which petitioners disapprove based on content, because they are controlled by military rather than civilian authorities.

There are three basic questions involved in analyzing and resolving this issue: (1) whether the areas of Fort Dix in question are open to the public; (2) whether civilians have a right to speak and distribute literature on the public streets, sidewalks and parks in the open areas of Fort Dix; and (3) whether the candidate respondents have a right to speak and distribute literature concerning their campaigns on the public streets, sidewalks and parks in the open areas of Fort Dix.

A.

The unrebutted evidence presented by respondents demonstrates that the areas in which respondents were allowed to exercise First Amendment rights are essentially indistinguishable from the surrounding civilian areas in New Jersey and are open to the public for any or no reason. Petitioners' suggested distinctions of *Flower* on the question of openness have no merit. In both *Flower* and this case, the overall military facility is primarily dedicated to military purposes, but the particular areas in question are not the situs of any activity other than the usual activities that take place on streets, sidewalks and parks. Similarly, in both *Flower* and this case, the military exercises control over and patrols the areas in question.

B.

In resolving the conflict of constitutional rights and governmental interests presented when a government regulation or practice infringes on First Amendment freedoms, the Court has evaluated the legitimacy and importance of the governmental interest involved. The Court has not based its analysis on the overall or generalized governmental interest in an institution or facility but rather has assessed the government's interest regarding the specific place and activity in question.

In this case, relief was not granted as to a "military base" but as to specific, open streets, sidewalks and parks. These public streets, sidewalks and parks are indistinguishable in terms of their nature and uses from the same facilities maintained by a city or county. We are not here concerned with First Amendment activities that may, because of their nature or location, interfere with government facilities or functions.

It is indicative of the lack of any peculiarly military interest that the justifications for petitioners' regulations and practices raised by military authorities in their testimony before the district court are the same justifications frequently raised by civilian authorities: speech presents a vague, conjectural possibility of disruption and respondents' views are contrary to theirs.

Petitioners' claims that speech might cause disruption or undermine morale and discipline have no concrete basis and are difficult to take seriously when petitioners do not censor exposure of soldiers to the mass media or to any civilian who wishes to enter the base and when "[m]embers of the military are, of course, continually exposed to the clash of political ideas" (Pet. Brief 40).

Petitioners have no legitimate, concrete military interest concerning these areas that is different from or rises above any governmental entity's interest in what happens on its public streets. There is no reason to depart from the usual rule that in government controlled areas to which the public has free and open access, particularly areas such as streets, sidewalks and parks, the government may neither prohibit all First Amendment activities by civilians nor selectively prohibit such activities based on content.

C.

In addition to petitioners' assertions concerning exercise of First Amendment rights by civilians generally, petitioners claim that speech by or on behalf of a candidate for elective office would violate the political neutrality of the military.

However, allowing various views and candidates to be heard does not constitute support of them or a violation of neutrality. In a free society, neutrality means allowing issues to be aired and conflicting views on them to be expressed.

Furthermore, petitioners allow wide and open distribution of some partisan materials and views at Fort Dix, in the mass media and publications such as *Army Times*. Petitioners regulations and practices are not neutral, either in the sense that all candidates and parties are heard or that none are heard.

Petitioners cannot selectively prohibit, on the basis of content, political speech by civilians whose message concerns a minor party candidacy while they allow speech by civilians whose message is non-political or political but not concerned with elections, particularly when they make available the partisan campaign views and activities of the major party candidates and encourage military personnel to vote. In our society, soldiers have a right to vote and a right to hear all the candidates and make up their own minds. Petitioners have no legitimate military interest in determining which campaigns and candidates will be heard by soldiers.

II.

The court of appeals ruled that civilians who have a First Amendment right to distribute literature on the public streets, sidewalks and parks in the open areas of Fort Dix cannot be required to submit their literature to military authorities for prior approval based on content.

This Court has never approved a prior restraint on constitutionally protected speech on public streets, sidewalks and parks. Petitioners claim that the lack of a system of prior restraint would pose an unexplained threat to morale and discipline at Fort Dix. However, if such a threat exists and petitioners take it seriously, it is difficult to understand why they allow the soldiers at Fort Dix to be exposed to uncensored mass media and to the views of any civilian who wishes to enter the base. We are not a nation that considers its soldiers second class citizens who can be isolated from exposure to the important societal issues of the day and indoctrinated with the beliefs of military leaders. Petitioners have no legitimate military interest in imposing a system of prior restraint.

Furthermore, the particular system of prior restraint at Fort Dix lacks the precise and narrow standards and procedural safeguards required for a valid prior restraint concerning even constitutionally unprotected speech.

ARGUMENT

I.

The candidate respondents have a right to speak and distribute literature concerning their campaigns on the public streets, sidewalks and parks in the open areas of Fort Dix.

It has long been established that in government controlled areas to which the public has free and open access, particularly open areas such as streets, sidewalks and parks, the government may neither prohibit all First Amendment activities nor selectively prohibit such activities based on content. E.g., *Lovell* v. *Griffin*, 303 U.S. 444; *Hague* v. *CIO*, 307 U.S. 496; *Schneider* v. *State*, 308 U.S. 147; *Thornhill* v. *Alabama*, 310 U.S. 88; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Murdock* v. *Pennsylvania*, 319 U.S. 105; *Jamison* v. *Texas*, 318 U.S. 413, 416 ("[o]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion"); *Tucker* v. *Texas*, 326 U.S. 517; *Edwards* v. *South Carolina*, 372 U.S. 229; *Tinker* v. *DesMoines Community School District*, 393 U.S. 503; *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415; *Lloyd* v. *Tanner*, 407 U.S. 551, 559 ("it has often been held that publicly owned streets, sidewalks, and parks are so historically associated with the exercise of First Amendment rights that access to them for purposes of exercising such rights cannot be denied absolutely"); *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 96.

Applying this principle, the Court held, in *Flower* v. *United States*, 407 U.S. 197, that First Amendment rights may be exercised by civilians on a sidewalk on a military base to which the public regularly has free and open access.[15] In this case, the court of appeals ruled that

15. The decisions of the lower courts following *Flower* demonstrate an appropriate regard for both military interests and the First Amendment. In addition to the instant case, see *United States* v. *Floyd*, 477 F.2d 217 (10th Cir. 1973); *Burnett* v. *Tolson*, 474 F.2d 877 (4th Cir. 1973); *CCCO-Western Region* v. *Fellows*, 359 F. Supp. 644 (N.D. Calif. 1972); *Jenness* v. *Forbes*, 351 F. Supp. 88 (D.R.I. 1972). See also *McGraw* v. *Farrow*, 472 F.2d 952 (4th Cir. 1973).

In *Burnett* v. *Tolson*, the Fourth Circuit found that Fort Bragg is open to the public, with civilians having free access to shopping areas, the post exchange, and motion picture theatre, and that the plaintiffs therefore had a right to "enter the public areas of Fort Bragg as leafleteers." 474 F.2d at 881.

The Tenth Circuit, in *United States* v. *Floyd*, held that Tinker Air Force Base is not open pursuant to the test in *Flower*. Tinker was posted with a large sign which reads: "WARNING. U.S. AIR FORCE BASE. IT IS UNLAWFUL TO ENTER THIS AREA WITHOUT PERMISSION OF THE COMMANDER TINKER AIR FORCE BASE . . ." 477 F.2d at 223. Five security guards were posted at the entrance, and a fence surrounded the entire installation.

Respondents Spock and Hobson, minor party candidates for national office, have a First Amendment right to speak and distribute literature concerning their campaigns on the public streets, sidewalks and parks in the open areas of Fort Dix.

Petitioners challenge the decision of the court of appeals on a number of grounds, including a claim that, contrary to *Flower*, civilians cannot exercise First Amendment rights on any portion of any military base, regardless of the openness of the base, the nature and uses of a particular area, the imposition of selective restrictions on speech based on content, or anything else (Pet. Brief 25, 28-33). In the following discussion, we have separated the general issue and petitioners' various arguments into three subissues, and we argue that: (1) the areas of Fort Dix in which respondents were allowed to exercise First Amendment rights are open to the public; (2) civilians have a right to speak and distribute literature on the public streets, sidewalks and parks in the open areas of Fort Dix; and (3) the candidate respondents have a right to speak and distribute literature concerning their campaigns on the public streets, sidewalks and parks in the open areas of Fort Dix.

A.

The areas of Fort Dix in which respondents were allowed to exercise First Amendment rights are open to the public.

The record demonstrates that, with the exception of the restricted areas, Fort Dix is essentially indistinguishable from the surrounding civilian areas in New Jersey. The unrebutted evidence presented by respondents shows that: there are no guards, sentries, barriers, gates, or other impediments to free and open access; civilians are authorized to enter the base for any or no reason; the base is crisscrossed by civilian thoroughfares; civilians enter and talk to military personnel, individually or in small groups, on any subject; some door-to-door handbilling is allowed; civilians address gatherings of military personnel on a variety of issues; these gatherings include large assemblies held outdoors and open to civilians.[16]

In their statement of the case (Pet. Brief 9-13) and in the footnote in which they attempt to distinguish *Flower* on the question of openness (*id.* at 34 n. 28), petitioners make several inaccurate and/or misleading statements, the most important of which are as follows:

(1) Petitioners state that "[m]ilitary police routinely stop persons on the reservation and ask them their reason for being on the post," citing the testimony and affidavit of Colonel Olsen, the Provost Marshal, at I-App. 25, 78 (Pet. Brief 11). This statement seems to indicate that civilians are stopped and questioned for no reason as a general practice, but Colonel Olsen testified quite differently. First, at I-App. 25 and 78, Colonel Olsen said that anyone acting "suspiciously" would be stopped. He added, *id.* at 25, that anyone "doing something improper or illegal . . . will be escorted to the nearest gate." See also *id.* at 69-70. Moreover, in testimony that petitioners failed to quote or cite,

16. The evidence is discussed in detail at pp. 2-8, *supra*.

Colonel Olsen indicated that "civilians are authorized on the post" (*id.* at 66), that they can come on the base or pass through for any reason or no reason without being stopped (*id.* at 66-68), that civilians are not routinely stopped or questioned (*id.* at 69), and that stops and arrests on the base are made on the same basis as in civilian communities (*id.* at 85).

(2) Petitioners state that "[f]rom time to time, military police establish roadblocks on roads within the reservation and stop all vehicles. Such stops are intended to assure that vehicles on the post are properly registered and to keep unauthorized demonstrators off the post," citing Colonel Olsen's testimony, at I-App. 79 (Pet. Brief 11). Colonel Olsen testified that roadblocks are sometimes set up because of demonstrations or to check that cars that should be registered on the base are duly registered (I-App. at 79). However, civilians are normally allowed to enter in their cars without being stopped or ejected (*id.* at 66-67).

(3) Petitioners state that "'No trespassing' signs are conspicuously posted over part of the area," citing Colonel Olsen's testimony, at I-App. 25, 78, 79 (Pet. Brief 34 n. 28).[17] This statement fails to indicate that Colonel Olsen testified, at I-App. 25, 78, 79, that such signs are only posted along boundaries of the base that are unfenced and otherwise unmarked, not at the entrances. Colonel Olsen also testified that ten entrances to Fort Dix, as well as a number of footpaths, have no guards, sentries, barriers, gates, or other impediments to free and open access by civilians (*id.* at 66-68). See also *id.* at 24, 52-53, 162-63, 200; photographic exhibits of two of the main entrances, II-App. E-2 (Wrightstown entrance), E-4 (New Jersey Route 68, with the sign "Visitors Welcome").

Petitioners' suggested distinctions of *Flower* on the question of openness have no merit. Petitioners claim that,

17. Petitioners more accurately referred to this testimony in their statement of the case (Pet. Brief 12).

unlike the area of Fort Sam Houston involved in *Flower*, "the areas of Fort Dix open to the public" are "dedicated primarily to military purposes" and patrolled by military authorities (Pet. Brief 34 n. 28).

In both *Flower* and this case, the overall military facility is primarily dedicated to military purposes, but the particular areas in question are freely open to civilians and are not the situs of any activity other than the usual activities that take place on streets, sidewalks and parks. The street and sidewalk involved in *Flower* and the streets and sidewalks involved in this case are both primarily dedicated to use by military and civilian personnel in getting from one place to another. There is no difference in this regard, and Petitioners offer no citation to the record or any evidence that would indicate a difference.

Similarly, in both this case and *Flower*, the military exercises control over and patrols the areas in question. Petitioners, like the district court,[18] seem to assume that the street involved in *Flower* was not patrolled by military authorities and that this Court's decision was based on that fact, but Flower's arrest there by military police on two occasions (for distribution of unauthorized literature) indicates quite clearly that the street was patrolled by military authorities.[19]

---

18. See Pet. App. 7a-8a, discussed *supra*, at pp. 8-9.

19. Petitioners attempt to distinguish *Flower* on two additional grounds (Pet. Brief 34 n. 28). First, petitioners state that *Flower* is distinguishable because the speech involved there was directed at civilians while here it is directed at military personnel. However, Flower's leaflets were apparently directed at anyone who would take one. *United States* v. *Flower*, 452 F.2d 80, 82, 90-91 (5th Cir. 1972). In any event, petitioners do not discuss the significance of this asserted distinction; if it has any significance, it would seem to lend additional support to respondents' claim since their message is directed at and concerns the specific audience they seek to reach. See *Lloyd* v. *Tanner*, 407 U.S. 551, 562.

Finally, petitioners claim *Flower* is distinguishable because respondents' speeches held pursuant to the district court's order

The record in this case demonstrates more thoroughly than the record in *Flower* that the areas in question are open to the public and that the military has "abandoned any claim that it has special interest in who walks, talks, or distributes leaflets" there. 407 U.S. at 198.

B.

Civilians have a right to speak and distribute litarature on the public streets, sidewalks and parks in the open areas of Fort Dix.

Petitioners, throughout their brief, pose a false dichotomy concerning the question of whether any civilians should have been allowed to exercise First Amendment rights in the open areas of Fort Dix. The Court is repeatedly asked to compare "public streets, sidewalks and parks"—where First Amendment rights clearly may be exercised (Pet. Brief 27-28) —to "military bases"—where petitioners urge the Court to suspend the First Amendment, without regard to the openness of the base, the nature and uses of a particular area, the imposition of selective restrictions on speech based on content, or anything else (*id.* at 25, 28-33).

However, the areas in which respondents were granted the right to speak and distribute literature *are* public streets, sidewalks and parks.[20] Military authorities are

---

were on a parking lot as opposed to a sidewalk. However, the parking lot location, arrived at as the result of negotiations between the parties, is surely in the nature of and not significantly different from streets, sidewalks and parks.

20. Although the First Amendment rights of civilians at Fort Dix may extend beyond the scope of this litigation, the only areas in question here are the public streets, sidewalks and parks on which respondents won the right to engage in face-to-face speech and distribution of literature. The candidate respondents were granted use of streets, sidewalks and parks, including a parking lot. Respondents Ginaven and Misch distributed literature on a sidewalk (I-App. 8, 89-92, 160-61). Respondent Hardy distributed

in control of the areas in question, but "military base" does not describe the *nature* or *uses* of these areas; they are public streets, sidewalks and parks, which "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," *Hague* v. *CIO*, 307 U.S. at 515. The issue is whether these public streets, sidewalks and parks, although open and freely and regularly used by civilians for speech or any other purpose, should be exempt from all political speech, or from political speech of which petitioners disapprove based on content, because they are controlled by military rather than civilian authorities. We have discussed this issue, first, in this section, with regard to speech by civilians that is political in the sense that it concerns various social, economic and political issues, and second, in the next section (Point IC), with regard to political speech by civilians that specifically concerns candidates and campaigns for elective office.

This Court's decisions establish standards for analyzing and resolving the conflict of governmental interests and constitutional imperatives presented when a government regulation or practice infringes on First Amendment rights.[21] E.g., *Southeastern Promotions* v. *Conrad*, 95

leaflets on a parking lot (*id.* at 36). Although Respondent Stanton distributed literature in a barracks (*id.* at 9, 37, 87-89), barracks were defined by petitioners as "restricted" areas (*id.* at 73), and therefore no relief was granted as to them (Pet. App. 30a-31a, 34a). Respondents did not challenge or appeal from this determination or present evidence or argument concerning any indoor areas or outdoor areas designated as restricted by petitioners.

21. In *United States* v. *O'Brien*, 391 U.S. 367, 377, the Court identified four basic considerations:

". . . if [the government regulation] is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

S.Ct. 1239; *Pell* v. *Procunier*, 417 U.S. 817; *Procunier* v. *Martinez*, 416 U.S. 396; *Tinker* v. *DesMoines Community School District*, 393 U.S. 503; *United States* v. *O'Brien*, 391 U.S. 367; *Adderly* v. *Florida*, 385 U.S. 39. See also *Niemotko* v. *Maryland*, 340 U.S. 268, 282 (Frankfurter, J., concurring). This analysis begins with an assessment of the precise governmental interest involved and a determination of the legitimacy and importance of that interest. E.g., *Procunier* v. *Martinez*, *supra*; *Healy* v. *James*, 408 U.S. 169; *Tinker* v. *DesMoines Community School District*, *supra*; *Adderly* v. *Florida*, *supra*; *Cox* v. *Louisiana*, 379 U.S. 559; *Edwards* v. *South Carolina*, 372 U.S. 229.

In this case, the government's interest is not nearly so broad or important as petitioners claim. Relief was not granted as to a "military base" but as to specific, publicly owned and controlled streets, sidewalks and parks which military authorities have decided to maintain wholly open to the public.[22] Petitioners frame the issue as a question of whether a "military base" is a "public forum," evoking, explicitly at one point, images of a Hyde Park in the midst of training exercises, or on the steps of this Court's building (Pet. Brief 32-35). The issue thus framed, petitioners go on to suggest that "history and tradition" determine where First Amendment rights may be exercised and that there is no history or tradition of their exercise on military facilities (*id.*).

If the history and tradition of an area were determinative in the sense that petitioners suggest, presumably *Hague* v. *CIO*, *Lovell* v. *Griffin*, and all of the related decisions of this Court vindicating First Amendment rights

22. Petitioners agree that "[p]ublic streets, sidewalks and parks are thus recognized by the Court as areas where the public has a right to engage in free speech. Historically, these are the traditional places for such activity and, although the state may impose reasonable regulations regarding time, place and manner in order to preserve the primary purposes of the areas, it cannot absolutely bar the public from using such places as public forums" (Pet. Brief 28).

would have been differently decided. In each of those decisions, the Court compelled a change in tradition regarding the exercise of First Amendment rights in the areas in question. In any event, notwithstanding petitioners' statements to the contrary, there is a history and tradition of exercise of First Amendment rights by civilians on portions of military facilities otherwise open to the public. See *Tucker* v. *Texas*, 326 U.S. 517; *Flower* v. *United States*, *supra*.

Furthermore, this Court has not analyzed governmental interests in terms of the government's generalized or overall interest in an institution or facility. For example, the Court did not evaluate the government's interest concerning "schools" in *Tinker* v. *DesMoines Community School*, *supra*, or concerning "prisons" in *Procunier* v. *Martinez* and *Pell* v. *Procunier*, both *supra*. Rather, the Court has evaluated the government's specific interest regarding the particular place and activity in question.

We are not here concerned with First Amendment activities that may, because of their nature or location, interfere with government facilities like a courthouse, see *Cox* v. *Louisiana*, 379 U.S. 559, or a jail, see *Adderly* v. *Florida*, 395 U.S. 39. In this case, there is no such facility or competing governmental function in the areas in question. These are open, public streets, sidewalks and parks, some of which are integrated with civilian urban areas, like Wrightstown, New Jersey, and others of which are, like most of the surrounding area, more rural.

These streets, sidewalks and parks, maintained as public facilities by the military at Fort Dix, are indistinguishable in terms of their nature and uses from the same facilities maintained by a city or county. Speech and leafletting are not the primary purpose of any street or sidewalk; they are primarily dedicated to a competing use, as thoroughfares on which people go from one place to another.[23] Petitioners have no legitimate, concrete

23. Petitioners argue that First Amendment rights may only be exercised where the "purpose" of the area is "to provide a public forum" (Pet. Brief 29-30). However, provision of a public forum is not the purpose of any public street, sidewalk or park, and petitioners' position is directly contrary to the long and consistent line of decisions starting with *Lovell* v. *Griffin*, *Hague* v. *CIO*, and *Schneider* v. *State*, all *supra*.

military interest—based on military needs or security—that is different from or rises above any governmental entity's interest in what happens on its public streets. The fact that these public streets, sidewalks and parks are militarily controlled would, of course, affect the "kinds of regulations of time, place and manner that are reasonable," *Grayned* v. *City of Rockford*, 408 U.S. 104, 116-17, but it does not provide justification for a total prior restraint on exercise of First Amendment rights by civilians.

It is indicative of the lack of any peculiarly military interest that the justifications for the total ban on political speech raised by the commander's representatives are the same justifications frequently raised by civilian authorities. Colonel Johnson and Colonel Olsen were asked to explain how political speech and leafletting on the open streets, sidewalks and parks would "interfere with our training and other military missions," as General David had said in his initial response to respondents' request to campaign at Fort Dix (I-App. 15). They did not refer to or even mention any specific or concrete interference with the training mission, nor is there any reference to such interference in the record or in petitioners' brief. Rather, they referred to interference that, they asserted, would result because speech presents the possibility of disruption (*id.* at 43-46, 53-54) and because respondents' views are contrary to theirs (*id.* at 64, 70, 76-77).[24]

Colonel Johnson testified that face-to-face expression of some views might result in disruption (*id.* at 48, 50-51). He did not, however, feel that way about expression of the views of the major party candidates or about an outdoor

24. General David and Colonel Johnson also claimed that speech by these minor party candidates would violate the neutrality of the military (I-App. 15, 42), which is discussed in Point IC, *infra*.

rock concert attended by 5,000 military personnel and civilians (*id.* at 43-46, 53-54). The record indicates that respondents' campaign speeches and leafletting were in fact not disruptive (*id.* at 172, 184). This asserted justification boils down to a vague, conjectural possibility that political speech might be disruptive.

The First Amendment constitutionalizes the judgment that speech is worth its "price" and the wisdom that more disruption results from the suppression of dissent than from its airing. The possibility of disruption can be minimized—as it is by federal, state, and local authorities throughout the country—by regulation of the time, place and manner of exercise of First Amendment rights. Moreover, petitioners have wholly adequate means for remedying disruption or illegal activity by civilians or military personnel without imposing a prior restraint on speech. See *Parker* v. *Levy*, 417 U.S. 733; 18 U.S.C. 1382, 2387.[25] And petitioners are very willing to tolerate other events having a more distinct possibility of disruption for purposes of which they "approve."

No restriction on First Amendment freedoms can be "greater than is essential to the furtherance of [an important or substantial] interest." E.g., *Procunier* v. *Martinez*, 416 U.S. 396, 411; *United States* v. *O'Brien*, 391 U.S. 367, 377. See also *Edwards* v. *South Carolina*, *supra*; *Police*

25. 18 U.S.C. §2387(a) provides:

"Whoever, with intent to interfere with, impair, or influence the loyalty, morale, or discipline of the military or naval forces of the United States:

"(1) advises, counsels, urges, or in any manner causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States; or

"(2) distributes or attempts to distribute any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty by any member of the military or naval forces of the United States—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both . . . ."

Department of Chicago v. *Mosley*, *supra*. The Court has repeatedly emphasized that:

> "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear . . . . [The government must demonstrate] something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."

Tinker v. *DesMoines Community School District*, 393 U.S. at 508; *Police Department of Chicago* v. *Mosley*, 408 U.S. at 101; *Grayned* v. *City of Rockford*, 408 U.S. 104, 117; *Healy* v. *James*, 408 U.S. 169, 191. See also *Terminiello* v. *Chicago*, 337 U.S. 1.

Colonel Johnson also testified that petitioners selectively prohibit speech based on content:

> "Q . . . isn't it true that the content of what a proposed visitor intends to say is the basis for whether he is allowed to come on or not? If, for instance, he says, 'I intend to urge the soldiers not to use drugs,' that, from what you have said, would be something that the Base might favorably look on. If he is going to inform them of some management principle that they are not aware of—
>
> "A That would further our mission, yes.
>
> "Q But if they are to speak against the war in Vietnam—
>
> "A That certainly wouldn't forward our mission, would it?
>
> "Q So the content of what they are to say, that is the basis of whether or not they are approved?
>
> "A Yes, to a great extent." *Id.* at 64.

Newspapers and leaflets are also approved or disapproved for distribution on the base according to their content (*id.* at 70, 76-77). Colonel Olsen testified that a newspaper not on the "approved" list has to be submitted for approval before it can be sold at base stores (*id.* at 76-77). "If it's a paper that is wrong," it will not be approved (*id.* at 77).[26]

Petitioners selectively prohibit speech based on content in three ways. While any civilian may generally discuss any subject with military personnel on the base, petitioners prohibit, based on content, speech that is "political," speech that expresses a view opposed to the war in IndoChina, and, as is discussed in Point IC, *infra*, speech by or on behalf of a candidate for elective office.

> Thus, "the operative distinction is the message," and,
>
> ". . . above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley*, 408 U.S. at 95.

See also *Pell* v. *Procunier*, 417 U.S. 817, 826; *Procunier* v. *Martinez*, 416 U.S. 396; *Healy* v. *James*, 408 U.S. 169, 187-88; *Shuttlesworth* v. *Birmingham*, 394 U.S. 147; *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 ("speech concerning public affairs is more than self expression; it is the essence of self-government"); *Niemotko* v. *Maryland*, 340 U.S. 268, 272; *Thornhill* v. *Alabama*, 310 U.S. 88; *Schneider* v. *State*, 308 U.S. 147; *Stromberg* v. *California*, 283 U.S. 359, 369 ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

---

26. Additional testimony indicated that all forms of speech are censored based on content. See note 8, *supra*.

Petitioners attempt to justify their selective prohibition of speech with a claim that certain viewpoints pose an unexplained threat to military morale and discipline (Pet. Brief 22, 39). However, in our society, soldiers are citizens providing a societal need, not an armed political force subject to political indoctrination by military leaders. Soldiers can hear, discuss, and consider various views, and they can vote. See *Carrington* v. *Rash*, 380 U.S. 89. Moreover, petitioners' claims that speech concerning important societal issues would undermine morale and discipline and pose a threat of disruption are hard to take seriously when they state that "[m]embers of the military are, of course, continually exposed to the clash of political ideas" (Pet. Brief 40) and they do not generally censor exposure of soldiers to the mass media or to any civilian who wishes to enter the base.

Fort Dix Regulation 210-27 and petitioners' practices do not merely impose incidental restrictions on First Amendment freedoms; rather, they are instruments of "suppression of free expression," *United States* v. *O'Brien*, 391 U.S. at 377; *Procunier* v. *Martinez*, 416 U.S. at 411. There is no legitimate, concrete military interest that would justify an unprecedented departure from the usual rule concerning public streets, sidewalks and parks.

C.

The candidate respondents have a right to speak and distribute literature concerning their campaigns on the public streets, sidewalks and parks in the open areas of Fort Dix.

Petitioners have objected to exercise of First Amendment rights by candidates for elective office as violative of their "neutrality" (Pet. Brief 35-38) and because "certain candidates might express views that could undermine the morale, obedience, and discipline of members of the military" (*id.* at 39). The claim that the views of some

candidates may undermine morale, obedience and discipline would apply to speech by any civilians, not just candidates. We have considered that claim primarily in our discussion of the right of civilians generally to speak and distribute literature (Point IB, *supra*), and in our discussion of the prior restraint on the content of literature distributed on the base (Point IIA, *infra*). In this discussion, we have considered the claim that speech by or on behalf of candidates would violate the political neutrality of the military, the only claim that applies specifically to candidates as opposed to civilians generally, and we have assumed that civilians may generally engage in face-to-face speech and distribution of literature on the open streets, sidewalks and parks of Fort Dix.

Allowing various views to be expressed and heard does not constitute support of those views or a violation of political neutrality.[27] If petitioners' view of neutrality were accepted, then federal, state, and local authorities would be considered partisan every time they allowed anyone to exercise any First Amendment rights.[28] To the contrary, neutrality—which respondents wholeheartedly support—means allowing issues to be aired and conflicting views on them to be expressed.

Moreover, if allowing the views of candidates to be heard constitutes a violation of neutrality, then it had already been violated at Fort Dix by petitioners' allowing wide and open distribution of *some* partisan materials and views at Fort Dix. The unrebutted evidence shows that television, radio, magazine and newspaper coverage of the partisan views and activities of the major party candidates

27. The court of appeals said, ". . . it stretches credibility to assume that permitting such use would be an endorsement . . . ." (Pet. App. 27a).

28. This is not a situation where there could be "lurking doubts about favoritism, and sticky administration problems . . . in parcelling out limited space," *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 304. In *Lehman*, the Court was concerned with limited space for posters on buses and a captive audience, not, the Court noted, "open spaces, [a] meeting hall, park, street corner, or other public thoroughfare," 418 U.S. at 303.

is widely and openly available to military personnel and civilians on the base, including the materials in *Army Times* discussed *supra* (see II-App. E-3). See also *Jenness* v. *Forbes*, 351 F. Supp. 88, 100-101 (D.R.I. 1972).[29]

29. After an extended litigation in *Jenness* concerning exercise of First Amendment rights by civilians (many of whom are respondents in this case) on Quonset Naval Base, the court determined that one portion of the base, located outside of a wire fence, was open and that the civilian plaintiffs could therefore exercise First Amendment rights there but not on the rest of the base. Only three days after the court's decision, the base commander, with the approval of the Department of Defense, allowed then Vice President Agnew and the Republican candidates for senator, governor, and attorney general of Rhode Island to make a campaign appearance attended by military personnel and hold a news conference on the base. A request by the Vice President's staff that the press be allowed on the base for the event was honored. Vice President Agnew's statements, including criticisms of the Democratic candidate for vice-president and a former Democratic attorney general, were fully covered and reported in the press.

The district court drew the following conclusions from these events, conclusions which we believe apply as well in the instant case:

"This incident constitutes a waiver of the argument that a significant security interest supports the prohibition on political speech. The Commander felt that there was no threat to the security of the base in allowing entry to four Republican candidates. It must follow that there is no security threat in allowing entry to two minority party candidates and their workers.

"* * *

"The Agnew visit poignantly emphasizes the validity of plaintiffs' argument that they, as minority party members, are denied access to channels of communication available to the two major parties, richer in resources of wealth, connections, and prestige. They must, plaintiffs argue, rely on face to face campaigning. Yet defendants would deny them even this morsel of campaign techniques, while making it available to major party candidates who need it less. The First Amendment does not allow the hypocrisy of defendants' 'political neutrality.'

"* * *

". . . Any meaningful military interest in enforcing the prohibition against plaintiffs has either been waived or, in reality, just does not exist." 351 F. Supp. at 100-101.

Petitioners' regulations and practices are not neutral, either in the sense that all candidates and parties are heard or in the sense that none are heard.[30] To the contrary, petitioners have exposed military personnel on the base to the views and candidates of the major parties while prohibiting exposure to respondents, who are minor party candidates with limited financial resources and no other means to reach this audience.[31] See *Lloyd* v. *Tanner*, 407 U.S. 551, 567; *United States* v. *O'Brien*, 391 U.S. 367, 388-89 (Harlan, J., concurring).

It is untenable—and impermissible—for petitioners to raise neutrality as a bar to airing minority party views when in fact they assist in publicizing the views of major party candidates. Petitioners cannot selectively prohibit, based on content, political speech by civilians whose message concerns a minor party candidacy while they allow speech by civilians whose message is non-political or political but not concerned with elections, particularly when they make available the partisan campaign views and activities of the major party candidates and encourage military personnel to vote. See *Williams* v. *Rhodes*, 393 U.S. 23; *Sweezy* v. *New Hampshire*, 354 U.S. 234; *Police Deaprtment of Chicago* v. *Mosley*, *supra*; *Mills* v. *Alabama*, 384 U.S. 214.

In *Williams*, the Court said:

". . . the right of qualified voters, regardless of their political persuasion, to cast their votes effectively

30. Petitioners argue that they operate under the latter scheme, where no candidates are heard (Pet. Brief 39-40). However, military personnel at Fort Dix are exposed to the campaigns of the major party candidates through the major national news media and periodicals like *Army Times*. A scheme under which military personnel are barred from exposure to any candidates would raise a serious question concerning the right of military personnel to vote and receive information.

31. The lack of a practical alternative means of reaching the audience, though relevant, is not a necessary component of respondents' claim. See *Southeastern Promotions* v. *Conrad*, 95 S.Ct. 1239, 1245; *Healy* v. *James*, 408 U.S. 169, 183; *Schneider* v. *State*, *supra*.

. . . rank[s] among our most precious freedoms." 393 U.S. at 30.

Petitioners would relegate soldiers to a second-class citizenship and allow military authorities to decide, based on content, the campaigns and candidates to which soldiers may be exposed based on the military's asserted interest in shielding them from "certain candidates [who] might express views that could undermine [their] morale, obedience, and discipline" (Pet. Brief 39).[32]

Some limitations on the rights of soliders may be required by military necessity, see *Parker* v. *Levy*, 417 U.S. 733, but surely soldiers retain the right to vote and the right to receive information concerning all the candidates, not just the candidates who are "approved" by military authorities. See *Carrington* v. *Rash*, 380 U.S. 89. The training and maintenance of an effective armed force is an important military mission; however, in our society, the military mission does not include political indoctrination of soldiers by military leaders. The candidate respondents put forward positions on many social, economic and political issues, including the war in IndoChina. All of these matters, as well as the determination of who should be president and vice president, are solely civilian, not military, concerns.[33]

Military authorities cannot, on the basis of what the court of appeals appropriately called a "feigned neutrality"

32. We are not here concerned with civilians or military personnel advocating disruption or violation of the law, for which the military has completely adequate remedies. See *Parker* v. *Levy*, 417 U.S. 733; 18 U.S.C. §§1382, 2387, discussed *supra*, at p. —. The claim that certain views might undermine morale, obedience and discipline is discussed in Point IB, *supra*, and Point IIA, *infra*.

33. Although the conduct of a war is a military concern, the decision of whether we enter or continue a war is a civilian concern, and citizens do not lose their right to consider that issue when they become soldiers. The principle that the people and their elected representatives decide when and if we go to war is basic to the Constitution and the Declaration of Independence.

(Pet. App. 29a), selectively screen exposure of soldiers to the candidates for President and Vice President of the United States. Petitioners' position is not supported by any legitimate military interest.[34]

II.

Civilians who have a First Amendment right to distribute literature on the public streets, sidewalks and parks in the open areas of Fort Dix cannot be required to submit their literature to military authorities for prior approval based on content.

Fort Dix Regulation 210-27 prohibits distribution of literature "without prior approval" of military authorities.

Colonel Johnson's testimony that viewpoints and candidates opposed to the war in IndoChina interfere with the military mission (I-App. 64) is contrary to our constitutional scheme and violative of the most basic rights of civilians and military personnel.

34. The court of appeals concluded in this regard:

"The record discloses that the military permits the circulation and distribution in Fort Dix of a wide range of newspapers and magazines, and that radios and televisions are available during off-duty hours. Thus the persons living in Fort Dix are exposed to the political ideas of those candidates whose campaigns are prominent enough or well-financed enough to attract widespread media coverage. In these circumstances the antisepsis of Fort Dix Regulations Nos. 210-26 and 210-27 is hardly a neutral antisepsis. What the Fort Dix voters are protected from, practically speaking, is exposure to the political ideas of those minor candidates whose campaigns are neither prominent enough not sufficiently well-financed to attract media coverage, and who must make do with the more old-fashioned face-to-face style of campaigning. Such a feigned neutrality serves no discernable military purpose, and cannot outweigh the First Amendment rights of the minor candidates." Pet. App. 28a-29a.

While petitioners claim that this regulation and their practices are not "based on content alone" (Pet. Brief 48), content is clearly the sole focus. Distribution of literature is not *per se* prohibited; the regulation concerns only distribution of literature the contents of which have not been approved by military authorities. Moreover, petitioners' arguments in support of the regulation and their practices are based on asserted evils that could result from a message that—because of its contents—"jeopardize[s] military loyalty, discipline, or morale" (*id.* at 47).

In *Southeastern Promotions* v. *Conrad*, 95 S.Ct. 1239, 1244, the Court discussed the following elements of a prior restraint: (1) an application for permission is required; (2) review is based on content; (3) approval is dependent on affirmative action by the authorities involved; and (4) approval is "not a matter of routine" but involves "appraisal of facts, the exercise of judgment, and the formation of an opinion." All of these elements are present in this case. See Army Regulation 210-10, II-App. E-58; Army Directive on Guidance and Dissent, *id.* at E-51; Department of Defense Directive 1325.6, *id.* at E-8; Fort Dix Regulation 210-27, Pet. 5-6; I-App. 62, 64, 69-70, 76-77, 154-55, 156-57, 192-93, 195-96.

In the following two sections, we argue that no prior restraint based on content may be placed on handbills distributed on the public streets, sidewalks and parks in the open areas of Fort Dix and that, even if such a prior restraint could be constitutional, this particular system of prior restraint lacks precisely and narrowly drawn standards and minimal procedural safeguards.

A.

No prior restraint based on content may be imposed on distribution of literature on the public streets, sidewalks and parks in the open areas of Fort Dix.

Prior restraints on First Amendment rights are

presumptively invalid. E.g., *Southeastern Promotions* v. *Conrad*, 95 S.Ct. 1239; *Police Department of Chicago* v. *Mosley*, *supra*; *Kunz* v. *New York*, 340 U.S. 290; *Thomas* v. *Collins*, 323 U.S. 516; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Schneider* v. *State*, *supra*; *Hague* v. *CIO*, *supra*; *Lovell* v. *Griffin*, *supra*; *Grosjean* v. *American Press*, 297 U.S. 233; *Near* v. *Minnesota*, 283 U.S. 697.

Of course, not every prior restraint is *per se* unconstitutional; there are a few "narrowly defined exceptions," *Southeastern Promotions* v. *Conrad*, 95 S.Ct. at 1247. For example, prior restraints have been allowed in the context of regulation of obscenity in motion pictures, where the speech regulated is not constitutionally protected. E.g., *Times Film Corporation* v. *Chicago*, 365 U.S. 43; *Freedman* v. *Maryland*, 380 U.S. 51.

However, the right to speak and distribute literature in a public place has historically carried with it the corrollary right to be free of prior restraint based on content. The Court has time and again rejected any prior restraint on constitutionally protected speech or distribution of literature on public streets, sidewalks and parks. E.g., *Police Department* v. *Mosley*, *Flower* v. *United States*, *Thomas* v. *Collins*, *Cantwell* v. *Connecticut*, *Schneider* v. *State*, *Hague* v. *CIO*, *Lovell* v. *Griffin*, all *supra*.

Petitioners essentially concede that a prior restraint on distribution of literature on public streets, sidewalks and parks is invalid (Pet. Brief 46), but they do not discuss the application and import of that principle or the *Flower* decision to this case. Rather, petitioners analyze this question, as they have analyzed this entire case, in terms of an asserted dichotomy between "public streets, sidewalks and parks" and "military bases," without identifying any specific or concrete military interest concerning these public streets, sidewalks and parks that would differentiate them from similar areas controlled by civilian authorities (Pet. Brief 46-51).

Petitioners claim that the lack of a system of prior restraint based on content could pose an unexplained

threat to morale and discipline at Fort Dix (Pet. Brief 43-50). If such a danger exists and petitioners take it seriously, it is difficult to understand why they allow the soldiers at Fort Dix to be exposed to uncensored mass media and to the thoughts of any civilian who wishes to enter the base. Petitioners assert no legitimate interest in selective filtration of ideas by military authorities or any reason to believe that soldiers cannot hear and consider various viewpoints and still perform their duties. In this regard, petitioners state that "[m]embers of the military are, of course, continually exposed to the clash of political ideas" (Pet. Brief 40) without noting any consequent decay in morale or discipline.

We are not a nation that considers its soldiers second-class citizens who can be isolated from exposure to the important issues of the day and indoctrinated with the beliefs of military leaders. Although some limitations on the rights of soldiers may be required by military necessity, see *Parker* v. *Levy*, 417 U.S. 733, our military institutions are under civilian control, and our soldiers are full citizens with a right to consider the social, economic and political issues of the day and a right to vote. See *Carrington* v. *Rash*, 380 U.S. 89.

Military authorities, like civilian authorities, have fully ample means to remedy any illegal, speech-related activities without imposing a prior restraint based on content.[35] Moreover, if a prior restraint based on content can be imposed on distribution of handbills on public streets, sidewalks and parks, surely military discipline and morale is not the only interest government authorities will raise to justify this form of censorship. Civilian authorities have also asserted important interests, such as preserving peace and order, but the Court has always ruled that they may not further those interests by a prior restraint on the content of handbills distributed on public streets, sidewalks and parks. Like their civilian counterparts, military

35. See p. 28, *supra*.

authorities have no legitimate interest in censorship of the thoughts and views to which the American citizens under their jurisdiction are exposed.

Free speech would be an empty phrase if it did not include the freedom to express views without prior censorship. This Court has never separated these two rights with regard to constitutionally protected speech in public places.[36] Indeed, the right to speak and distribute literature on public streets, sidewalks and parks was first enunciated by this Court in cases that involved the corrolary right to be free from prior censorship there, *Lovell* v. *Griffin*, *Hague* v. *CIO*, and *Schneider* v. *State*, all *supra*. From that time to the present, including the *Flower* decision, the Court has refused to allow prior restraints based on content on our public streets, sidewalks and parks.

B.

The system of prior restraint at Fort Dix lacks precise and narrow standards and procedural safeguards.

Since no prior restraint on constitutionally protected speech and distribution of literature on public streets,

36. Petitioners concede the connection of these two rights:

"Official actions identified as unconstitutional prior restraints have occurred where public officials had forbidden the plaintiffs the use of *public places* to say what they wanted to say. *Southeastern Promotions, Ltd.* v. *Conrad* . . . (emphasis added). But when, as here, the place is not a public forum to begin with, the power to deny its use in advance of actual expression is not constitutionally suspect." Pet. Brief 46.

Petitioners transform the Court's use of the phrase "public place" into the phrase "public forum" and argue that the open areas of Fort Dix are not "public forums." As we argue in Point IB, *supra*, public streets, sidewalks and parks in civilian communities, like those at Fort Dix, are not primarily dedicated to use as public forums. However, if they are open to the public and use for exercise of First Amendment rights does not unduly conflict with their primary purpose, they are an appropriate situs for exercise of First Amendment rights.

sidewalks and parks has been approved by the Court, there are no decisions concerning the standards and procedural safeguards that would be required. However, the Court's decisions concerning systems of prior restraint in the context of regulation of obscenity[37] provide some basis for evaluating the system of prior restraint at Fort Dix.[38]

First, there must be precise and narrow standards that do not infringe on constitutionally protected speech. E.g., *Roth* v. *United States*, 354 U.S. 476; *Jacobellis* v. *Ohio*, 378 U.S. 184.

Fort Dix Regulation 210-27 provides no standards. Petitioners state that approval would be denied only "in regard to publications that clearly threaten military discipline or morale" and that a commander cannot prevent distribution because he does not like the contents or because a publication "is critical—even unfairly critical—of government policies or officials," citing Army regulations and directives (Pet. Brief 43-44). However, the Army's Directive on Guidance and Dissent, cited by petitioners, and Department of Defense Directive 1325.6 provide that the fact that a publication "is critical of government policies or officials" is not "in itself" a ground for disapproval (II-App. E-8, E-51), which would appear to mandate consideration of whether the content is critical of government policies or officials. The record reveals, moreover, that at Fort Dix the standards actually applied to various forms of speech include whether the message "further[s] our mission" and whether it is "wrong" (I-App. 64, 76-77).

The standard "clearly threaten[s] military discipline or morale" fails to specify any required immediacy or magnitude of an anticipated threat to discipline or morale.

37. The standards evolved in the context of the obscenity cases have been applied to seizures of imported materials and restrictions on the use of the mails. *United States* v. *Thirty-seven Photographs*, 402 U.S. 363; *Blount* v. *Rizzi*, 400 U.S. 410.

38. Presumably, the standards applied in this context, involving constitutionally protected activity on public streets, sidewalks and parks, would be more stringent.

By further providing that a publication should not be denied approval solely because it is "critical of government policies or officials," petitioners have mandated that the standard "clearly threatens military discipline or morale" includes consideration of whether the publication is critical of government policies and officials. Such criticism is, of course, constitutionally protected, and this gloss indicates that the standard concerns not only avoidance of disruption and illegal conduct but raw censorship. Many of the publications allowed on the base, including certainly anything containing the views of major as well as minor party candidates seeking to replace an incumbent president, would be suspect pursuant to this standard. And if criticism of government policies and officials is to be considered, how is the censor to distinguish allowable from prohibited criticism? No basis or standards for this distinction are provided.

Furthermore, the record demonstrates that the actual standards applied at Fort Dix include whether the content "further[s] our mission," which is interpreted to exclude a viewpoint opposed to the war in IndoChina, and whether the content is "wrong" (I-App. 64, 76-77). Although the conduct of a war is surely a military mission, the decision of whether or not the United States enters or continues a war is just as surely a civilian, not military, concern, and military personnel, as well as civilians, have a right to consider and participate in that decision. These standards are vague and overly broad, giving the censor discretion to prohibit clearly protected speech.

Secondly, the system of prior restraint at Fort Dix lacks the minimal procedural safeguards necessary for a valid system of prior restraint of obscenity. The Army regulations and directives and Fort Dix Regulation 210-27 fail to: (1) place the burden of instituting judicial proceedings and the burden of proof on the censor; (2) provide a specific, brief time limitation for preserving the status quo pending judicial action; or (3) provide for a judicial determination.[39] E.g., *Southeastern Promotions* v. *Conrad*, 95 S.Ct. at 1247; *Freedman* v. *Maryland*, 380 U.S. 51; *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70-71.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

DAVID KAIRYS
KAIRYS & RUDOVSKY
1427 Walnut Street
Philadelphia, Pa. 19102
Counsel for Respondents

September, 1975

39. A military official or board "may well be," like the administrative censorship board in *Southeastern Promotions* v. *Conrad*, 95 S.Ct. at 1247-48, "less responsive than a court, an independent branch of government, to constitutionally protected interests in free expression."

*Counsel was assisted in the preparation of this brief by Linda Backiel, a law student at the Rutgers Law School at Camden, and Martha Bush, a law student at the University of Pennsylvania Law School.